87-1941

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LILLIAN SLAY RUSSELL,

Petitioner

versus

GERALD L. RUSSELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

ROY L. HALCOMB, JR.,
COUNSEL OF RECORD
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ATTORNEYS FOR PETITIONER,
LILLIAN SLAY RUSSELL

QUESTIONS PRESENTED FOR REVIEW

I. Whether the State of Louisiana is precluded by federal law from treating military disability retirement benefits as divisible under Louisiana community property law.

II. Whether the Supreme Court for the State of Louisiana has decided a federal question in a way in conflict with the decision of other state courts.

III. Whether the Supreme Court for the State of Louisiana has decided an important question of federal law which has not been, but should be, settled by this court.

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JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on February 26, 1988.

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of the State of Louisiana by writ of certiorari is conferred by 28 U.S.C. 1257(3).

STATUTORY PROVISIONS INVOLVED

This is an action which involves Title 10 U.S.C. Sections 1408(c)(1) and (a)(4), Title 10 U.S.C. Section 1201 and Louisiana Civil Code Article 2340. The pertinent texts are set forth in the appendix.

STATEMENT OF THE CASE

This matter arises out of an action for partition of community property filed by LILLIAN

SLAY RUSSELL, petitioner, wherein she seeks to have certain military retirement benefits received by her former husband, GERALD L. RUSSELL, respondent, declared community property pursuant to Louisiana Civil Code Article 2340.

In response to the petition, respondent initially filed a motion for summary judgment which raised the federal question of whether or not the decision of this Court in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728 (1981) and the legislative overruling of that decision by Congress on September 8, 1982 by enacting the Uniform Services Former Spouses' Protection Law, Public Law 97-252, now codified at 10 U.S.C. 1408, effectively prohibits the states from dividing military disability retirement pay pursuant to state community property laws.

At the hearing on the motion for summary judgment the trial judge concluded that the benefits received by respondent were military disability benefits which, as a matter of law, could not be classified as community property under the laws of the State of Louisiana, stating as follows:

> "At the time the Congress of the United States enacted or amended Section 1408 to make retired pay subject to the property laws of the various states, it had the opportunity to do so with disability retirement pay as well. Had it been silent as to whether or not disability as well as non-disability retirement pay was included in the act, then argument could be made that disability pay was included as the chapter deals with the computation of both types of pay. However, Section 1408, as enacted, specifically excludes the retired pay of a member retired for disability, and, accordingly, under the rationale of the McCarty case, it must be concluded that military disability retirement pay is not susceptible of division by a state court pursuant to state community property laws."

(Trial court's ruling on motion for summary judgment, dated January 16, 1984, Appendix pages 60a - 61a.)

This ruling was appealed to the Third Circuit Court of Appeal, State of Louisiana, which reversed the judgment of the trial court and remanded for a trial on the merits on the basis that the record contained no evidence as to the type or amount of respondent's pension or whether, considering that respondent's length of military service fell just a few days short of qualifying respondent for a twenty year non-disability retirement, the pension presents a calculable combination of both disability and non-disability. (Judgment of Third Circuit Court of Appeal dated March 6, 1985, Appendix pages 40a - 48a.)

After remand, the case was tried on October 31, 1986. After taking the case under advisement, the trial court again held that

the military retirement benefits being received by respondent were disability benefits and were, therefore, as a matter of law, not subject to division under the community property laws of the State of Louisiana. (Trial court's ruling after trial on the merits, dated November 18, 1986, Appendix pages 30a - 35a.)

Prior to trial, respondent also filed a Motion to Terminate Alimony. This motion was heard by the trial court on November 3, 1986. On November 18, 1986 the trial court awarded a reduction in alimony from TWO HUNDRED AND NO/100 ($200.00) DOLLARS per month to ONE HUNDRED AND NO/100 ($100.00) DOLLARS per month. Although subsequently appealed, petitioner does not seek review of this decision herein.

The judgment of the trial court on all issues was thereafter appealed to the Third Circuit Court of Appeal, State of Louisiana. The Court of Appeal reversed the judgment of the trial court insofar as it held that the military retirement benefits being received by respondent were wholly disability benefits and therefore not subject to division under the community property laws of the State of Louisiana. (Judgment of Third Circuit Court of Appeal dated December 9, 1987, Appendix pages 5a - 27a.)

The Court of Appeal held that, as a matter of law, Louisiana is precluded from treating military disability retirement benefits as community property. However, the Court of Appeal went on to hold that it was not possible from the evidence to accurately separate respondent's retirement benefits into that part that was disability pay and

that part which was non-disability pay.

Accordingly, the Third Circuit Court of Appeal, State of Louisiana, ordered that the case be again remanded to the trial court to allow respondent the opportunity to offer evidence and show, to the extent he can, what part, if any, of the retirement benefits which he is now receiving and which he has received in the past from the military is in fact disability retirement pay. (Judgment of Third Circuit Court of Appeal dated December 9, 1987, Appendix pages 5a - 27a.)

Petitioner then applied for writ of certiorari or review with the Supreme Court of the State of Louisiana, which was denied. (Denial of writ by Supreme Court of State of Louisiana, dated February 26, 1988, Appendix pages 1a - 2a.)

In so finding, it appears that the Supreme Court for the State of Louisiana has decided a federal question in a way in conflict with the decision of other state courts. Further, it appears that the Supreme Court for the State of Louisiana has decided an important question of federal law which has not been, but should be, settled by this court.

Petitioner has accordingly filed this Petition for Writ of Certiorari, seeking to have the judgments of the lower courts reversed and judgment rendered herein in her favor, recognizing petitioner's right to a community interest in all of the military retirement benefits accumulated during the marriage between the petitioner and respondent, including non-disability and disability retirement benefits.

Although this case has been remanded to the trial court for a determination of the amount

of petitioner's interest, if any, in the military retirement benefits at issue, the Louisiana Supreme Court, by denying petitioner's application for writ of certiorari or review, has finally determined the federal issue herein. Further proceedings cannot affect this federal issue. Accordingly, the decision of the Louisiana Supreme Court is final for purposes of review in this Court. New York v. Cathedral Academy, 434 U.S. 125, 98 S.Ct. 340, 54 L.Ed.2d 346 (1977).

ARGUMENT

Prior to the decision of this Honorable Court in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed. 2d 589 (1981), it was the law in Louisiana that military disability retirement benefits were community property. See Succession of Scott, 231 La. 381, 91 So.2d 574 (La. 1956), Swope v. Mitchell, 324

So.2d 461 (La. App. 3 Cir. 1975).

On June 26, 1981, in McCarty, supra, this Court held that federal law precludes a state court from dividing non-disability military retirement benefits pursuant to state community property law. This case expressly excluded military disability retirement benefits from consideration by stating:

> "The question presented by this case is whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military non-disability retired pay pursuant to state community property laws." at p. 2730, emphasis added.

On September 8, 1982, the Congress of the United States adopted the Uniform Services Former Spouses' Protection Law, Public Law 97-252, now codified at 10 U.S.C. 1408. This statute had the effect of legislatively overruling McCarty, supra, and removing the federal preemption of state law regarding

divisibility of non-disability military pensions and to allow state courts to render judgments consistent with the decisions rendered prior to McCarty. That Act provides, in pertinent part, as follows:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of each court." 10 U.S.C. 1408(c)(1)
>
> "'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title [10 U.S.C.S. Sections 1201 et seq.])..." 10 U.S.C. 1408(a)(4)

In passing the Act, Congress intended to obliterate the adverse effects of McCarty upon the divorced spouses of military personnel. Menard v. Menard, 460 So.2d 751 (La. App. 3 Cir. 1984); Simmons v. Simmons, 453

So.2d 631 (La. App. 3 Cir. 1984); Moreau v. Moreau, 457 So.2d 1285 (La. App. 3 Cir. 1984). As acknowledged by the North Dakota Supreme Court in Bullock v. Bullock, 354 N.W.2d 904, 907-8 (N.D. 1984):

> "'The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the McCarty decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible....S. Rep. No. 97-502, 97th Cong., 2d Sess. 16 (1982), reprinted in 1982 U.S. Code Cong. and Ad. News 1596, 1611."

At issue herein is whether or not Louisiana, as a matter of law, is precluded from treating respondent's military disability retirement pay as divisible under the community property laws of this state. It is

petitioner's position that neither McCarty nor the cited Act pertain whatsoever to military disability pay. Since the intent of Congress in passing 10 U.S.C. 1408 was to protect former spouses by overruling McCarty, which affected non-disability benefits only, the law relative to divisibility of disability benefits under state community property law remained unchanged. Accordingly, petitioner is entitled to recognition of a community interest in the whole of the military retirement benefits received by respondent, whether disability or non-disability related, pursuant to Louisiana Civil Code Article 2340.[1]

1. Louisiana Civil Code Article 2340 provides that "Things in the possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property."

Respondent contends that, since disability retirement pay is excluded from the statutory definition of disposable retired pay under 10 U.S.C. 1408, and the statute only mentions non-disability retirement pay, then it should necessarily follow that Congress did not intend that the community property laws of the states be applied to divide disability retirement pay.

Petitioner respectfully submits that such is not the intent of the law. 10 U.S.C. 1408 was intended to legislatively overrule McCarty, which had application to non-disability retirement benefits alone. For that purpose, it specifically applies only to non-disability retirement benefits received after June 25, 1981. This is the day before the McCarty decision was rendered. The Act was not intended to provide for any division and/or classification of property. To the

contrary, the sole purpose and intent of the Act was to return to the states, to the extent McCarty had held that federal law preempted state law, the right to classify military retirement pay as community or separate property according to the community property laws of each individual state.

Other state courts which have considered this question have come to conflicting decisions. See, e.g. Conroy v. Conroy, 706 S.W.2d 745 (Tex. App. 8 Dist. 1986) (military disability pay subject to division under Texas community property law); King v. King, 386 N.W. 2d 562 (Mich. App. 1986) (military disability pensions not subject to division as a marital asset); Campbell v. Campbell, 474 So.2d 1339 (La. App. 2 Cir. 1985) (VA disability benefits which were substituted for military disability benefits subject to a community interest); Morrison v. Morrison, 286 Ark.

353, 354, 692 S.W.2d 601, 602 (1985) (disability retirement benefits subject to division); Freeman v. Freeman, 468 So.2d 326, 328 (Fla. 5th Dist. Ct. App. 1985) (disability pension not subject to equitable distribution); Lookingbill v. Lookingbill, 301 Md. 283, 289-90, 483 A.2d 1, 4 (1984) (disability pension benefits are marital property subject to equitable distribution); Stroshine v. Stroshine, 98 N.M. 742, 744, 652 P.2d 1193, 1194 (1982) (disability pension benefits subject to division under state community property law).

This court has never directly addressed and answered the issue presented by this petition for writ of certiorari. Whether or not, after a consideration of McCarty and 10 U.S.C. 1408, Louisiana is precluded from treating military disability retirement pay as divisible under the community property

laws of this state is an important question of federal law which has not been, but should be, settled by this Court.

For the foregoing reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted and the judgments of the courts below should be reversed, recognizing the community interest of petitioner in the whole of the military retirement benefits received by respondent, whether disability or non-disability related, pursuant to Louisiana Civil Code Article 2340.

Respectfully submitted,

BROUSSARD, BOLTON,
HALCOMB & VIZZIER

BY: _____
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ATTORNEYS FOR PETITIONER,
LILLIAN SLAY RUSSELL

C E R T I F I C A T E

I hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari has been sent to Mr. Eugene P. Cicardo, Attorney at Law, Post Office Box 1591, Alexandria, Louisiana 71309-1591, by placing same in the United States Mail, postage prepaid, properly addressed, this 25th day of May, 1988, at Alexandria, Louisiana.

OF COUNSEL

STATE OF LOUISIANA

PARISH OF RAPIDES

Before me, the undersigned authority, personally came and appeared ROY S. HALCOMB, JR., who did depose and state that he is counsel of record for LILLIAN SLAY RUSSELL in this petition for a writ of certiorari to the Supreme Court of the State of Louisiana and that affiant did on the 25th day of May, 1988, deposit with Federal Express, with postage prepaid and properly addressed to the Clerk of the United States Supreme Court, the foregoing petition for writ of certiorari; and that the aforesaid date was within the time allowed for filing by the United States Supreme Court.

ROY S. HALCOMB, JR.

SWORN TO AND SUBSCRIBED before me, Notary Public, this 25th day of May, 1988.

Kathryn Fowler VanHoof
Notary Public

APPENDIX

THE SUPREME COURT OF THE STATE OF LOUISIANA

LILLIAN SLAY RUSSELL

VS. NO. 88-C - 0076

GERALD L. RUSSELL

- - - - - -

IN RE: Russell, Lillian Slay; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA87-0053; Parish of Rapides 9th Judicial District Court Div. "B" Number 129,760

- - - - - -

February 26, 1988

Denied. No error of law.

LFC

JAD

WFM

JLD

HTL

CALOGERO, J., would grant to resolve the

conflict between this case and Campbell v. Campbell, 474 So.2d 1339 (La. App. 2 Cir. 1985) although I believe that the court of appeal opinion is probably correct.

Watson, J., would grant the writ.

Supreme Court of Louisiana

February 26, 1988

/s/ Clerk of Court
Clerk of Court
For the Court

==========

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

P. O. Box 3000

Lake Charles, Louisiana 70602

NOTICE OF JUDGMENT

TO ALL COUNSEL OF RECORD:

ATTACHED YOU WILL FIND A COPY OF THE JUDGMENT OF THIS COURT IN A CASE IN WHICH YOU ARE ATTORNEY OF RECORD.

Your attention is invited to Rule 2.18.2 of the Uniform Rules - Courts of Appeal, which regulates applications for rehearing.

Please note also that it is no longer necessary to apply to the Court of Appeal for a rehearing as a prerequisite to applying to the Supreme Court for writs.

Cordially yours,

Kenneth J. deBlanc
Clerk of Court

cc: Suit Record

(NOTE: Office hours are 8:30 A.M. to 4:30 P.M. for filings).

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DEC 9 1987

NO. 87-53

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

LILLIAN SLAY RUSSELL

Plaintiff - Appellant

VERSUS

GERALD L. RUSSELL

Defendant - Appellee

Appeal from the Ninth Judicial District Court, Parish of Rapides, State of Louisiana; Hon. William P. Polk, District Judge, Presiding.

Before DOMENGEAUX, GUIDRY and LABORDE, Judges

DOMENGEAUX, JUDGE

Plaintiff, Lillian Slay Russell filed suit against her former husband, Gerald L. Russell, seeking a community property

interest in certain military disability retirement benefits being paid to defendant. From a final judgment holding these benefits to be defendant's separate property, and in addition, reducing plaintiff's alimony amount, plaintiff has appealed.

Two issues are presented for our review.

(1) Whether the contested military benefits were retirement benefits, thus susceptible to community property division or whether they were disability benefits, thus defendant's separate property.

(2) Whether or not the trial court erred in determining that there was a change in circumstances sufficient to warrant a reduction in plaintiff's alimony.

FACTS

On January 31, 1955, defendant, Gerald Russell entered the U. S. Army. He married

plaintiff, Lillian Slay Russell on October 5, 1958. On September 21, 1972, defendant retired from the Army after being credited with serving 19 years, 11 months and 5 days. Mr. Russell would have been eligible to retire after completing twenty years, but instead, he chose to retire under 10 U.S.C. Sec. 1201 because he had been determined to be 30% permanently disabled. Payments entitled "military retirement disability benefits" commenced on January 1, 1977.

After nineteen years of marriage, plaintiff and defendant were divorced on June 1, 1978. For fourteen of these years defendant had been in the Army and had accrued time towards retirement benefits. A community property agreement signed by both parties after the divorce made no reference to the military disability retirement benefits.

In 1983, Mrs. Russell sued Mr. Russell

for her community interest in these payments. Initially, she claimed that military disability retirement benefits are community property just like other retirement benefits and therefore, subject to community partition. Alternatively, she argued that even if military disability retirement benefits are not community property, the payments defendant is receiving are not, in fact, disability benefits but instead, are a combination of both disability and retirement benefits, the latter of which are community assets. Defendant contested plaintiff's claim by arguing that these payments were disability benefits and, by law, were his separate property.

Defendant moved for summary judgment which was granted. In ruling for the defendant, the trial court held that the benefits defendant was receiving were solely for disability and, by law, could not be subject to

community property partition.

Earlier in these proceedings, we reviewed the correctness of the summary judgment granted by the trial court. See Russell v. Russell, 465 So.2d 181 (La. App. 3rd Cir., 1985). In that opinion we discussed other Circuit Court decisions which involved military disability retirement benefits, including Inzinna v. Inzinna, 456 So.2d 691 (La. App. 5th Cir.), writ denied, 461 So.2d 317 (La. 1984). We concluded that "disability retirement pay, although nominally a disability pension, can be a community asset if and to the extent that some amount thereof reflects nondisability retirement credible service." at 465 So.2d 183. We then set aside the judgment and remanded the case for a further determination of exactly what type of pension defendant was receiving; specifically, whether or not it represented a calculable combination of both disability and

nondisability benefits.

After a trial on the merits, the trial court again concluded that the payments were solely disability benefits and therefore, constituted defendant's separate property. The Court also ruled that there was a significant enough change in circumstances to warrant lowering plaintiff's alimony from $200.00 to $100.00 a month because the plaintiff was now gainfully employed. Plaintiff has appealed the correctness of both rulings by the trial court.

THE MILITARY PENSION BENEFITS

Plaintiff argues that the trial judge erred in holding that disability benefits, as a matter of law, are a spouse's separate property and therefore, cannot belong to the community. Alternatively, plaintiff argues that even if the Court was correct in holding that disability benefits are, by law,

separate property, in this case, defendant failed to prove that these payments were, in fact, disability benefits. Plaintiff argues that these benefits are actually a combination of both disability and retirement benefits, the latter of which are subject to community partition under Louisiana law.

Initially, under Louisiana law military retirement benefits acquired during the existence of the community were considered community property and were subject to partition. Swope v. Mitchell, 324 So.2d 461 (La. App. 3rd Cir. 1975); Moon v. Moon, 345 So.2d 168 (La. App. 3rd Cir.); writ denied, 347 So.2d 250 (La. 1977). Louisiana jurisprudence seldom considered the issue of whether or not disability retirement pensions would also be considered community property. However, in Succession of Scott, 231 La. 381, 91 So.2d 574 (1956), the Court classified a disability retirement pension as a community

asset. It was therefore, subject to a claim by the surviving widow. Thus, under Louisiana law both disability and non-disability retirement benefits had been treated as community assets subject to partition.

In McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), the United States Supreme Court held that federal law preempted the application of state law in the area of military retirement benefits. The Court further ruled that military retirement benefits were the separate property of the retiring spouse.

The following year Congress enacted the "Uniformed Services Former Spouses Protection Act", which legislatively overruled McCarty, supra. Subsequently codified in Title 10 of the United States Code, the key provision removing federal preemption in the area of military retirement benefits can be found in

10 U.S.C. Sec. 1408(c)(1) which provides that:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 (the decision date of McCarty, supra), either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisprudence of such court."

Thus, military retirement benefits, termed "disposable retired or retainer pay" in 10 U.S.C. 1408(c)(1) were again subject to the application of state community property laws.

However, the original definition of "disposable retired or retainer pay" in 10 U.S.C. Sec. 1408(a)(4) read as follows:

> "The total monthly retired or retainer pay to which a member is entitled (other than the

> retired pay of a member retired for disability under Chapter 61 of this title (10 U.S.C. Sec. 1201 et seq.)) . . . " (emphasis added).

The apparent exclusion of disability retirement pay from the definition of "disposable retired or retainer pay" led to conflicting interpretations by our Circuit Courts on whether or not state courts were free to apply state laws to military disability retirement benefits.

In Campbell v. Campbell, 474 So.2d 1339 (La. App. 2nd Cir.) writ denied, 478 So.2d 148 (La. 1985), the Second Circuit concluded that federal law does not preempt state law in the area of Veterans Administration disabilty (sic) retirement benefits. This holding was based on the Court's interpretation that it was Congress' intent, through the use of such specific language, to only overrule the holding of McCarty. Since McCarty addressed only non-

disability retirement benefits, the Court concluded that the language used in 10 U.S.C. Sec. 1408(a)(4) was aimed only to overrule McCarty, and did not intend to create an area of federal preemption in regard to military disability retirement benefits.

In Inzinna, supra, and in our prior opinion in this case, both the Fifth Circuit and this Circuit concluded that the language in 10 U.S.C. Sec. 1408(a)(4) does create an area of federal preemption regarding military disability retirement benefits. Consequently, payments that compensate a retiring member for a disability are the member's separate property. We remanded this case for a further determination of what percentage of Mr. Russell's payments are for his disability and what percentage, if any, are for his retirement, only the latter of which is subject to community division.

In 1986, Congress amended 10 U.S.C.

Sec. 1408(a)(4) to read as follows:

> "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled less amounts which
> . . .
>
> (E) in the case of a member entitled to retired pay under chapter 61 of this title (10 USC Sec. 1201 et seq.), are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); . . .
>
> (As amended Nov. 14, 1986, P. L. 99-661, Div. A, Title VI, Part D, Sec. 644(a), 100 Stat. 3887.) (emphasis added).

The new definition of disposable retired or retainer pay clearly indicates that Congress intended to exclude from disposable retired or retainer pay those benefits that are paid as compensation for a member's disability. Therefore, we hold that all past, present and future benefits paid to Mr.

Russell that are compensation for his disability are his separate property and are not subject to community division. However, any amounts paid in excess of his disability compensation would be part of the disposable retired or retainer pay. Thus, this excess amount would be subject to a community property claim by Mrs. Russell for the fourteen years she and defendant were married while defendant was enlisted in the Army.

After reviewing the evidence presented at trial, the trial judge ruled that the entire amount paid to Mr. Russell was given for his disability and therefore, was his separate property. Plaintiff-wife argues that under La. C.C. art. 2340, assets acquired during the existence of the community are presumed to be community assets. Since the right to the contested benefits vested during the existence of the community, plaintiff contends that these benefits are

presumed to be community assets, i.e., retirement benefits. Plaintiff argues that defendant presented insufficient evidence to establish that these benefits were disability compensation in order to rebut the presumption that they were retirement benefits.

While it is difficult from the evidence to accurately characterize the benefits, it appears that the trial judge erred in holding that the entire amount paid to defendant was for disability compensation. The evidence showed that from January 1, 1977, until January 31, 1985, Mr. Russell received $55,557.69 in total benefits (plaintiff's exhibit No. 9). Of this gross amount, the Army considered $18,115.09 to be taxable income. Military disability retirement pay is exempt from taxation if it is received for personal injury or sickness resulting from active service in the Armed Forces. 10 U.S.C. Sec. 1403; 26 U.S.C. Sec. 104(a)(4),

Internal Revenue Code of 1986. Therefore, because part of the payments defendant received were treated as taxable income by the federal government, it is unlikely that the entire amount paid to defendant consisted of disability retirement pay.

As defendant's payments appear to include money in addition to his disability benefits and since the apparent excess amount would be subject to Mrs. Russell's community property claim, in order to ascertain exactly what benefits defendant is receiving, it is necessary to determine the method the Army used to calculate defendant's benefits. Presumably, defendant's benefits were based on 10 U.S.C. Sec. 1401(a) which provides two optional methods of calculation.[1] Under the first method, defendant was eligible

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[1] This court has assumed that defendant's benefits were calculated under one of the two methods provided in 10 USC 1401(a). If the Army used

another method to calculate defendant's benefits, the trial court is ordered to consider any amount received by the defendant that is equivalent to 30% of his final basic pay to be defendant's separate property. Any benefits defendant received that would be greater than 30% of defendant's final basic pay are susceptible to defendant's community property claim.

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to receive 2½% of 20 years of service multiplied by his retirement base pay. This would have resulted in defendant receiving 50% of his final monthly basic pay. Alternatively, defendant could have received his retired base pay multiplied by his percentage of disability. As defendant was 30% disabled, under the second method of calculation, he would have received 30% of his final monthly basic pay. Therefore, depending on the method used, defendant has been receiving either 50% or 30% of his final basic pay.

The evidence does not show which method the Army used to calculate defendant's benefits; nor does the evidence show whether defendant is receiving 50% or 30% of his

basic pay. However, if defendant is receiving 50% of his basic pay, under the new definition of disposable retired or retainer pay in 10 U.S.C. Sec. 1408(a)(4)(E), the amount paid which exceeds 30% of defendant's final basic pay, (the amount he is entitled to as disability compensation) would clearly be part of the disposal retired or retainer pay. Therefore, this excess amount would be subject to partition under Louisiana community property law. If defendant is receiving only 30% of his final basic pay, this would be disability compensation, and hence, defendant's separate property.

Thus, it is necessary to again remand this case for determination of exactly how the Army calculated defendant's retirement benefits. Specifically, it is necessary to learn whether defendant is receiving 50% or 30% of his final basic pay. If defendant is receiving 50% of his final basic pay, Mrs.

Russell has a community interest in that portion which exceeds 30% of defendant's final basic pay. Because a 50% rate of retirement pay would be calculated on defendant's 20 years of service, Mrs. Russell's community interest in the excess amount would be limited to the fourteen years that she and defendant were married while he was in the service. If defendant is receiving only 30% of his final basic pay, this is his separate property and not susceptible to a claim by Mrs. Russell. Inasmuch as the record is devoid of the Army's method of calculation of defendant's retirement disability benefits, we are unable to determine what benefits defendant is receiving. We must therefore again remand this case for further evidence concerning the method of calculation.

REDUCTION OF ALIMONY

Mrs. Russell also appeals the trial

judge's ruling reducing her alimony from $200.00 a month to $100.00 a month.

When the parties were divorced in 1978, Mrs. Russell was unemployed. Presently, Mrs. Russell is gainfully employed, earning a net income of $668.98 per month. Mrs. Russell's present employment was the primary reason the trial judge reduced the alimony amount. Plaintiff argues that this alone was insufficient to warrant the reduction.

La. C.C. art. 160 outlines the guidelines a court must considering in awarding alimony after divorce. Paragraph A(4) of this article provides:

> "Permanent periodic alimony shall be revoked if it becomes unnecessary and terminates if the spouse to whom it has been awarded remarries or enters into open concubinage." (Emphasis added).

For a court to alter an alimony award, including one established by a consent judgment, the party seeking modification must

show a change in circumstances of either party from the time of the award to the time of the trial of the alimony rule. Bernhardt v. Bernhardt, 283 So.2d 226 (La. 1973); Cromwell v. Cromwell, 419 So.2d 974 (La. App. 3rd Cir.), Romero v. Romero, 463 So.2d 268 (La. App. 3rd Cir.), writ denied, 465 So.2d 735 (La. 1985).

Under article 160, a spouse may be awarded alimony only if he or she proves they do not have sufficient means of support. In determining the needs of the claimant spouse the reasonable cost of food, clothing, shelter, utilities, transportation, medical care, and household expenses are considered as well as tax liability generated by alimony payments. Green v. Green, 432 So.2d 959 (La. App. 4th Cir. 1983). Much discretion is vested in the trial court in determining the amount of alimony. In the absence of a clear showing of an abuse of discretion, the amount

set by the trial judge will not be disturbed on appeal. Vesper v. Vesper, 469 So.2d 458 (La. App. 3rd Cir. 1985).

Defendant in Rule exhibit No. 1, showed Mrs. Russell's monthly expenses to be $1,042.45. Of this amount, Mrs. Russell spent $270.00 a month on food for herself and for her three major children still residing with her. The needs of major children should have no influence in determining a spouse's need for alimony. Green, surpa (sic). Since the food expenses of major children should not have been included in the list of Mrs. Russell's expenses, we will conclude that food expenses for Mrs. Russell alone equaled 1/4th of the listed amount, i.e., $67.50 a month. Therefore, Mrs. Russell's actual total monthly expenses are $839.95.

In his reasons for judgment, the trial court found that Mrs. Russell had earned

additional income through sales of Avon products and had netted the following amounts: $354.23 in 1983, $1,496.90 in 1984, and $354.26 in 1985. The trial judge concluded that based on the additional income presently being earned by Mrs. Russell, Mr. Russell had shown sufficient change in circumstances to warrant a reduction in alimony. We do not find this ruling to be an abuse of his discretion. We therefore affirm the trial court's ruling reducing Mrs. Russell's alimony from $200.00 to $100.00 per month.

For the above and foregoing reasons this case is remanded for a determination of whether defendant has been receiving 50% or 30% of his final basic pay. Once this has been determined, the trial court is ordered to render judgment consistent with the views expressed herein.

Costs on appeal are assessed one-half each to appellant and appellee.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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CIVIL SUIT NO. 129,760

DIVISION "B"

LILLIAN SLAY RUSSELL * NINTH JUDICIAL DISTRICT COURT

VERSUS * PARISH OF RAPIDES

GERALD L. RUSSELL * STATE OF LOUISIANA

JUDGMENT

This cause came on to be heard pursuant to regular assignment on October 31, 1986 and November 3, 1986. Present were both parties with their respective attorneys of record. After reviewing the pleadings, hearing the evidence and considering the arguments of counsel, the Court considered the law and the evidence to be in favor thereof, for the written reasons assigned on November 18, 1986,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defen-

dant, GERALD L. RUSSELL, and against the plaintiff, LILLIAN SLAY RUSSELL, dismissing plaintiff's demands with prejudice and further ordering that this Court's previous aware of alimony in favor of plaintiff be reduced from TWO HUNDRED AND NO/100 ($200.00) DOLLARS per month to ONE HUNDRED AND NO/100 ($100.00) DOLLARS per month, with all costs of these proceedings to be paid by plaintiff.

JUDGMENT RENDERED on November 18, 1986.

JUDGMENT SIGNED at Alexandria, Rapides Parish, Louisiana, this 25 day of November, 1986.

/s/William P. Polk
JUDGE NINTH JUDICIAL
DISTRICT COURT

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CIVIL SUIT NUMBER 129,760

LILLIAN SLAY RUSSELL * NINTH JUDICIAL
DISTRICT COURT

VERSUS * PARISH OF RAPIDES

GERALD L. RUSSELL * STATE OF LOUISIANA

REASONS FOR JUDGMENT

PARTITION OF PROPERTY

The wife has brought the instant suit for a partition of her former husband's military disability benefits.

The parties were married in 1958 and petitioned for separation on January 31, 1977.

Mr. Russell entered the military on January 31, 1955. He was discharged on September 21, 1972 on a disability retirement.

On January 25, 1984 this Court granted a

motion for summary judgment dismissing plaintiff's petition for a partition of defendant's retirement benefits. The Court of Appeal, Third Circuit, reversed and remanded the case for trial. In its opinion the Court of Appeal held:

> "We read the Inzinna case to mean that disability retirement pay, although nominally a disability pension, can be a community asset if and to the extent that some amount thereof reflects nondisability retirement creditable service. ..... The record as presently made up contains no evidence as to the type of his pension, or the amount of it, or whether, considering that his length of service fell just a few days short of qualifying him for a twenty year nondisability retirement, the pension represents a calculable combination of both disability and nondisability benefit."

In the case of Campbell v. Campbell, 474 So.2d 1339 (La. App. 2 Cir. 1985) the Court held in part;

> "Furthermore, we hold that the mere designation of a portion of

> retirement pay as disability pay for tax purposes cannot defeat the vested community property interest of a former spouse."

A reading of Campbell and Inzinna v. Inzinna, 456 So.2d 691 (La. App. 3rd Cir. 1984) which held that disability pay was to be excluded in figuring "disposable retired or retiree pay" indicate that disabilty (sic) pay is not considered in the same light as retirement pay.

Section 1408 under Title 10, Chapter 61 of the United States Code specifically excluded disability pay in its legislative overruling of McCarty v. McCarty, 453 US 210.

Mr. Russell's testimony and the exhibits offered in evidence show conclusively that all of his retirement pay, i.e. 30% of his base pay, is a result of a permanent disability. There was no designation of a portion of retirement pay as disability pay, hence

Campbell was not applicable.

Having concluded that all of Mr. Russell's retirement pay is the result of his disability, these payments are not susceptible of division in accordance to the community property laws of this State.

Accordingly the demands of the plaintiff that there be partition of defendant's military disability retirement pay is rejected.

MOTION TO TERMINATE ALIMONY

Mrs. Russell who was divorced from her husband in 1978 received, at that time, child support for the parties' three minor children plus permanent alimony. Since that date the three children have reached majority and Mrs. Russell no longer receives child support. However, she continues to receive alimony in the sum of $200.00 per month.

At the time of the divorce Mrs. Russell

was not employed. At the present time Mrs. Russell is employed by Alexandria Anesthesia Service with a net monthly income of approximately $670.00. Mrs. Russell's income tax returns show that she also sells Avon products. In 1983 she had net profit from this business of $354.23, in 1984 $1,496.90 and in 1985 354.26 (sic).

Although Mrs. Russell has considerable living expenses her three major children still live with her but make no monetary contribution to her.

Clearly Mr. Russell has shown a change in circumstances sufficient to justify a decrease in his alimony payments.

The Court will decrease the amount of alimony from $200.00 to $100.00 per month.

Alexandria, Louisiana this 18 day of November, 1986.

/s/ William P. Polk
WILLIAM P. POLK

District Judge
Division "B"

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REHEARING

SPECIAL NOTICE OF RULE CHANGE

UNIFORM RULES -- COURTS OF APPEAL

Rule 2-18.2 of the Uniform Rules -- Courts of Appeal has been amended to shorten the delays for rehearing applications in Civil matters from 30 to 14 days. The time for filing for rehearing in Criminal cases remains the same - 14 days. CCP ART. 2166; CCP ART. 922 effective August 30, 1983.

* * * * *

CIVIL APPEALS ONLY

REHEARING FEE

SPECIAL NOTICE OF AMENDMENT

LSA-R.S. 13:352 has been amended to provide for a filing fee of $35.00 for rehearing applications in civil cases in the courts of appeal (ACT 208,1984 session) effective July 1, 1984.

NO APPLICATIONS FOR REHEARING WILL

BE ENTERTAINED

UNLESS THE FEE ACCOMPANIES THE APPLICATION

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OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

P. O. Box 3000

Lake Charles, La. 70602

NOTICE OF JUDGMENT

TO ALL COUNSEL OF RECORD:

ATTACHED YOU WILL FIND A COPY OF THE JUDGMENT OF THIS COURT IN A CASE IN WHICH YOU ARE ATTORNEY OF RECORD.

Your attention is invited to Rule 2.18.2 of the Uniform Rules - Courts of Appeal, which regulates applications for rehearing.

Please note also that it is no longer necessary to apply to the Court of Appeal for a rehearing as a prerequisite to applying to the supreme (sic) Court for writs.

Cordially yours,

Kenneth J. deBlanc
Clerk of Court

cc: Suit Record

(NOTE: Office hours are from 8:30 A.M. to 4:30 P.M. for filings.)

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MAR 6 1985

NO. 84-233

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

LILLIAN SLAY RUSSELL

Plaintiff-Appellant

VERSUS

GERALD L. RUSSELL

Defendant-Appellee

On Appeal from the Ninth Judicial District Court, Parish of Rapides, State of Louisiana, The Honorable Lewis O. Lauve, Judge, presiding.

Before: DOUCET, LABORDE and YELVERTON, Judges.

Yelverton, Judge.

The issue in this partition of community property appeal is whether the summary judgment evidence was sufficient to support a summary judgment holding that Lillian Russell

has no community property interest in the military retirement benefits of her former husband. We find that the summary judgment evidence was insufficient to make that determination, and so we set aside the judgment and remand the case for trial on the merits.

Gerald Russell enlisted in the U.S. Army on January 31, 1955. He and Lillian Russell married on October 5, 1958. He stayed in the Army for 19 years, 11 months, and five days, and on September 21, 1972, he received a medical discharge for permanent disability. The couple was legally separated on March 3, 1977, and at that time the community property was amicably divided but no consideration was given to Gerald's retirement benefits. They were divorced on June 1, 1978.

In November 1983 Lillian Russell filed the present suit seeking a partition of the military retirement pension. In response to the suit Gerald filed a motion for summary

judgment. In support of the motion he filed his own affidavit indicating that he was medically discharged based on permanent physical disability, and he also filed a copy of Department of Defense Form 214. This form showed that his total creditable service was 19 years, 11 months, and five days, and that he received a retirement discharge by reason and under the authority of 10 U.S.C. Sec. 1201 for permanent disability. The record does not reflect the amount of his retirement benefits, past or present, and, except for the references on Form 214, the record does not show the type of retirement benefits that he has received since his retirement, or what he is presently receiving. The record does not show what portion of his benefits are attributable to creditable service, or what portion to disability, or whether such a division exists or can be made.

The trial court wrote an excellent opinion regarding this vexatious problem, concluding that under applicable law (McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981) and 10 U.S.C. Sec. 1201, et seq), military disability retirement benefits are not susceptible of being divided or diminished under the community property laws of this state. It is our opinion, however, that in the light of the developing jurisprudence on the subject since the trial court's decision in this case, and in consideration of the highly restrictive conditions under which our law permits a summary judgment, we must remand for trial on the merits.

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits show no genuine issue as to material fact, and that the mover is entitled to judgment as a matter

of law. LSA-C.C.P. art. 966. One who moves for summary judgment has the burden of demonstrating clearly the absence of a genuine issue of fact and any doubt as to the existence of such an issue is resolved against the mover. Whitney v. Mallet, 442 So.2d 1361 (La. App. 3rd Cir. 1983), writ denied, 445 So.2d 437 (La. 1984).

In Inzinna v. Inzinna, 456 So.2d 691 (La. App. 5th Cir. 1984) writ denied ____ So.2d ____ (1984), the wife filed suit against her husband for partition of his military retirement pension. Evidently the husband had received a disability discharge since a portion of his pension constituted disability pay. The appellate court was confronted with the issue of whether the wife had a community right to that portion of the military pension that was not disability pay. Affirming the district court's holding that she did, the Louisiana 5th Circuit said:

"(1) It is clear from the wording of 10 U.S.C. Sec. 1408, the applicable statute,[1] that "disposable retired or retainer pay" excludes disability pay, and Mrs. Inzinna is not entitled to any portion of the pension which constitutes such disability pay.

"(2) The statute also permits courts of the individual states to treat the disposable retired pay as community or separate property according to the law of the particular jurisdiction.[2] This section as amended, effective on February 1, 1983, reverses the Supreme Court decision of McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed. 589 (1981), which decision held that military pensions were "personal entitlements", (i.e., not community property) and on which appellant has partially relied.

"Our brothers in the First and Second Circuits have recently held that in light of the aforementioned Congressional enactment, a court may treat military retirement pay in accordance with applicable state law, and that in Louisiana such retirement pension is community property.[3] We agree. Louisiana jurisprudence has long held that the non-employed spouse has an interest in proceeds from such retirement annuities. See Sims v. Sims, 358 So.2d 919 (La. 1978) for Justice Tate's discussion of the history of such pensions as community property.

> "(3) Moreover, counsel for appellee, in oral argument, emphasized that Mrs. Inzinna seeks an interest only in those payments accruing subsequent to February 1, 1983. "Since that is the date on which the amendment to 10 U.S.C. 1408 became effective, as previously stated, it is evident that appellee is clearly entitled to an interest in said payments as a matter of law."
>
> (footnotes omitted)

See also Moreau v. Moreau, 457 So. 2d 1285 (La. App. 3rd Cir. 1984) and Simmons v. Simmons, 453 So. 2d 631 (La. App. 3rd Cir. 1984), writ denied ____ So. 2d ____ (1984).

Our Supreme Court was asked to grant writs in the Inzinna case, and the application was denied. We read the Inzinna case to mean that disability retirement pay, although nominally a disability pension, can be a community asset if and to the extent that some amount thereof reflects nondisability retirement creditable service. With this possibility in mind, the uncertainty in the basic

facts of the present case takes on added importance in the evaluation of the evidence for summary judgment purposes.

In the present case the trial court evidently concluded that since the husband received a disability discharge that his pension constituted disability pay and was excluded in the definition of "disposable retired or retainer pay" under 10 U.S.C. Sec. 1408. The record as presently made up contains no evidence as to the type of his pension, or the amount of it, or whether, considering that his length of service fell just a few days short of qualifying him for a 20-year nondisability retirement, the pension represents a calculable combination of both disability and nondisability benefits.

For these reasons we find that the trial court erred in granting the former husband's motion for summary judgment. The judgment is

set aside and the judgment is remanded to the trial court for further proceedings. Costs of this appeal shall be paid by appellee.

JUDGMENT SET ASIDE: CASE REMANDED.

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C E R T I F I C A T E

(TO BE FILED IN SUIT RECORD #129,760)

LILLIAN SLAY RUSSELL

VS.

GERALD L. RUSSELL

STATE OF LOUISIANA

PARISH OF RAPIDES

THIS IS TO CERTIFY THAT on the 25th day of January, 1984, Notice of the signing of the Judgment in this case was mailed to all parties and/or counsel interested therein.

WITNESS my hand at Alexandria, Louisiana, on this 25th day of January, 1984.

ROBERT L. STEWART

CLERK OF COURT

BY: /s/Gail Wilking

DEPUTY CLERK OF COURT

TO: Mr. Roy Halcomb
Mr. Richard E. Lee

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CIVIL SUIT NUMBER 129,760

LILLIAN SLAY RUSSELL :NINTH JUDICIAL

DISTRICT COURT

VERSUS :PARISH OF RAPIDES

GERALD L. RUSSELL :STATE OF LOUISIANA

FILED: January 25, 1984: /s/ Gail Wilking

DY. CLK.

JUDGMENT

This cause coming on for hearing on a motion for summary judgment filed on behalf of defendant, GERALD L. RUSSELL, when after considering the petition filed on behalf of plaintiff, LILLIAN SLAY RUSSELL, the motion for summary judgment and attached affidavits filed on behalf of GERALD L. RUSSELL, the law and the evidence being in favor of mover, GERALD L. RUSSELL it is hereby

ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed on behalf

of GERALD L. RUSSELL is granted and plaintiff's suit for partition is dismissed at plaintiff's cost.

JUDGMENT RENDERED the 16th day of January, 1984 signed in Chambers this 25th day of January, 1984.

/s/ Lewis O. Lauve
LEWIS O. LAUVE, DISTRICT JUDGE

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CIVIL SUIT NO. 129,760

LILLIAN SLAY RUSSELL — NINTH JUDICIAL DISTRICT COURT

VERSUS — PARISH OF RAPIDES

GERALD L. RUSSELL — STATE OF LOUISIANA

REASONS FOR JUDGMENT

This is a suit for partition of community property filed by Lillian Slay Russell in which she asks that the following described community property, set forth in her detailed descriptive list, be partitioned as forming a part of the community estate, to-wit:

> "1. All amounts, past and future, received and to be received by Gerald L. Russell as a result of his retirement from the military service since plaintiff and defendant were legally separated."

In response the defendant, Gerald L. Russell, filed a motion for summary judgment

to which he attached an affidavit setting forth in part, the following:

> "2. On September 21, 1972, he received a medical discharge based on permanent physical disability, all as is evidence by a copy of the Department of Defense Form 214 which is attached hereto and made a part hereof."

Attached to the aforesaid affidavit is a copy of Form DD-214 which indicates that the reason and authority for discharge is permanent disability.

Plaintiff has not filed counter affidavits and there is no other evidence of record that in any way refutes or questions defendant's position that the retirement benefits now being received by him are due to disability related retirement rather than non-disability related retirement. There is no issue as to material fact, the only question being whether under applicable law military disability retirement benefits are suscep-

tible of being divided or diminished under the community property laws of this state.

The applicable statute is Title 10, Chapter 61 of the United States Code (10 USCA, 1201 et seq.) entitled "Retirement or Separation for Physical Disability".

Section 1201 of that chapter provides that the Secretary (of the applicable service) may retire a member of the armed forces, with retired pay computed under Section 1401 of this Title, under certain conditions specified therein. Section 1401 is found under Chapter 71 of Title 10 which is entitled "Computation of Retired Pay". Except for some instances which are not pertinent to a determination of this case, the provisions of Chapter 71 do not distinguish between "disability" or "non-disability" retired pay until one encounters Section 1408. The importance of this observation

will be subsequently noted.

Prior to June 26, 1982, various state courts had dealt with the question of whether or not the retired pay of a serviceman was subject to the family property laws of their respective states. Many states, and notably the State of California, which has community property laws similar to those of Louisiana, had ruled that federal military retirement benefits were subject to the community property laws of its state. On June 26, 1981, the United States Supreme Court, in the case of McCarty vs. McCarty, 453 US (sic) 210, 69 L. ed.(sic) 2nd 589, overruled a California Court of Appeal and held that on dissolution of the marriage, federal law precludes a state court from dividing military non-disability retirement pay pursuant to state community property laws. Subsequent to that, Congress either adopted or modified Section

1408 of Chapter 71 to specifically provide that state courts could treat the "disposable retired pay" of a serviceman either as property solely of the member or as property of the member and his spouse in accordance with the laws of the jurisdiction of such court. (10 USCA 1408(c)(1).

The U.S. Supreme Court in the McCarty decision recognized that there were three basic forms of military retirement: Non-disability retirement, disability retirement and reserve retirement. By its own limitation, it considered only the first, that is, non-disability retirement.

In like manner, Congress, in defining "disposable retired pay" which a court could classify as community property under the laws of the state, defined disposable retired pay as "the total monthly retired....pay to which a member is entitled (other than the retired

pay of a member retired for disability under Chapter 61 of this Title) less amounts which....."(10 USCA 1408). Accordingly, neither the Supreme Court in its decision nor the Congress in its subsequent legislation considered or provided for the treatment of military disability retirement pay by state courts. The question for determination is whether or not under the rationale of the McCarty case, military disability retired pay as now provided for, can be divided pursuant to the community property laws of this state. A study of the McCarty case reveals that it can not.

In the McCarty case, the United States Supreme Court concluded that the consequences of the community property rights established by state law sufficiently injured the objectives of the federal program to require non-recognition of the state laws. The court's reasons for reaching this conclusion are

numerous, sometimes confusing, and as intimated by the dissenting opinion, not in the least bit logical. Nevertheless, the majority of the court concluded that a serviceman's retired pay was a personal entitlement which Congress intended for his personal benefit and which could not be taken from him or in anyway diminished or divided without explicit authority of Congress. The court cited numerous other Federal statutes providing for retirement benefits in which Congress had specifically provided for subjection to state property laws or the decisions of state courts. Among those were the Foreign Service and Civil Service retirement systems. It also pointed to other Federal retirement acts where Congress has provided benefits for spouses such as the railroad retirement act, and others.

Argument could be made that many of the reasons relied on by the Supreme Court to

conclude that the non-disability military retirement pay was personal to the serviceman do not apply to disability retired pay. However, most of the reasons cited by the Court apply to disability retired pay, and, in fact, by analogy, additional reasons could be assigned to the disability retirement pay that were not applicable to the non-disability pay, that would make it personal to the recipient.

At the time the Congress of the United States enacted or amended Section 1408 to make retired pay subject to the property laws of the various states, it had the opportunity to do so with disability retirement pay as well. Had it been silent as to whether or not disability as well as non-disability retirement pay was included in the act, then argument could be made that disability pay was included as the chapter deals with the computation of both types of pay. However,

Section 1408, as enacted, specifically excludes the retired pay of a member retired for disability, and, accordingly, under the rationale of the McCarty case, it must be concluded that military disability retirement pay is not susceptible of division by a state court pursuant to state community property laws.

The Motion for Summary Judgment is granted and plaintiff's suit for partition is dismissed insofar as it seeks to divide defendant's disability retirement pay. Costs are to be paid by plaintiff.

Alexandria, Louisiana, this 16th day of January, 1984.

/s/ Lewis O. Lauve
LEWIS O. LAUVE
DISTRICT JUDGE
DIVISION "F"

Title 10 U.S.C. Section 1408(c)(1)

"Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

Title 10 U.S.C. Section 1408(a)(4)

"'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired

pay of a member retired for disability under chapter 61 of this title [10 USCS Sections 1201 et seq.]) less amounts which...."

Title 10 U.S.C. Section 1201

Section 1201. Regulars and members on active duty for more than 30 days: retirement

Upon a determination by the Secretary concerning that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title [10 USCS Section 270(b)]) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physicial disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title [10 USCS Section 1401], if the Secretary also determines that --

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either --

(A) the member has at least 20 years of service computed under section 1208 of this title [10 USCS Section 1208]; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the deter-

mination; and either --

(i) the member has at least eight years of service computed under section 1208 of this title [10 USCS Section 1208];

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14, 1978.

LOUISIANA CIVIL CODE ARTICLE 2340

"Art. 2340. Presumption of community

Things in the possession of a spouse during the existence of a regime of community of [1] acquets and gains are presumed to be community, but either spouse may prove that they are separate property.

1. The word "of" has been added on authority of R.S. 24:253."

(2)

Docket No. 87-1941

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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LILLIAN SLAY RUSSELL,
Petitioner
vs.

GERALD L. RUSSELL,
Respondent

----------0----------

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION

EUGENE P. CICARDO
LAW OFFICES OF EUGENE P. CICARDO
P O DRAWER 1591
ALEXANDRIA, LA 71309
TELEPHONE: 318/487-4562

ATTORNEYS FOR RESPONDENT

==========

QUESTION PRESENTED

Whether the Supreme Court of the State of Louisiana was correct in denying the writ of certiorari or review filed by petitioner affirming in part, reversing in part and remanding from a judgment from the Ninth Judicial District Court, Parish of Rapides, State of Louisiana.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The facts of the case are stated in the opinion of the Court of Appeals, Third Circuit, State of Louisiana, 520 So.2d at 437 (Petitioner's Appendix A, pp. 6A through 10A)

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REASONS FOR DENYING THE WRIT OR ALTERNATIVELY, FOR SUMMARY DISPOSITION AFFIRMING THE DECISIONS OF THE COURTS BELOW

I. Petitioner has not demonstrated any "special and important reasons" warranting the exercise of this Honorable Court's discretionary power of review, as described in U.S. Sup.Ct.Rule 17, 18 U.S.C.A.

II. The decisions below are in full accord with the principles expressed in decisions of this court, and the Court of Appeals correctly interpreting 10 U.S.C. Section 1408, excluding disability retirement pay from the definition of "disposable, retired or retainer pay."

ARGUMENT

The plaintiff appellant in the instant case sought to have partitioned as community property all amounts, past and future, received and to be received by the defendant appellee resulting from his retirement from the military since plaintiff and defendant were legally separated. The primary issue in this case is whether the retirement benefits being received by the plaintiff, classified as disability benefits, are subject to the community property laws of the State of Louisiana. The defendant-appellee has maintained from the beginning that his disability pay that he has been and is receiving is not subject to the community property laws of Louisiana because of exclusion in 10 U.S.C. 1408 (a)(4). (Petitioner's petition for a writ of certiorari, page 13). Following the original trial the trial court adopted defendant-appellee's argument and held that the military retirement benefits which defendant-appellee is now receiving and which he has received in the past

are disability benefits which, as a matter of law, cannot be treated as community property under Louisiana Community Property Laws.

In McCarty vs McCarty, 453 U.S. 210, 101 Sup. Ct. 2728, 1981, this Court held that Federal Law preempted the application of State Law in the area of military retirement benefits. This court ruled that military retirement benefits were benefits of only the retiring spouse. The following year, Congress responded to the court's ruling in McCarty by enacting the "Uniform Services Former Spouses Protection Act" which legislatively overruled McCarty. Further, Congress set a retro-active effective date on the new Act as of the day that the McCarty decision was handed down. Thereafter the gist of 10 U.S.C. 1408was that the State could treat the property solely as that of the member or as property of the member and his spouse in accordance with the jurisdiction of the State. Therefore, military retirement benefits were,again, subject to the application of state community property law.

However, there was a distinction made and that distinction was that military retirement benefits do not include disability retirement pay.

Thus, the issue in the instant case parallels that over McCarty:

> "The question presented by this case is whether, upon the disolution of a marriage, federal law precludes a state court from dividing military non disbility retired pay pursuant to the state community property law." (at page 2730.)

The facts of Inzinna vs. Inzinna, 456 So.2d 691 (La. App 5th Cir 1984), are similiar to the instant case. In that case, Mr. Joseph Inzinna enlisted in the U. S. Air Force in April, 1947. He and his wife were married in May, 1953. Mr. Inzinna retired from the military in 1969 and the couple was subsequently divorced in May, 1980. In the instant case, Mr. Gerald L. Russell entered the U. S. Army in August 1952. He and his wife were subsequently married in

October, 1958. Mr. Russell retired from the service in September, 1972 and thereafter Mr. & Mrs. Russell separated in January, 1987. Both cases had husbands entering the military prior to becoming married, enjoying an otherwise healthy marriage life, thereafter retiring, and years later obtaining a divorce. In the Inzinna case the court ruled that "disposable retired or retainer pay" for purposes of the Federal Statute exclude disability pay and, therefore, the former wife seeking partition of the community property was not entitled to any portion of her former husband's military service pension which constituted disability pay. The court stated in pertinent part "It is clear from the wording of 10 U.S.C. Section 1408, the applicable statute that 'disposable retired or retainer pay' excludes disability pay, and Mrs. Inzinna is not entitled to any portion of the pension which constitutes such disability pay."

Respondent maintains that the court in Inzinna

correctly identified the issue and correctly interpreted the statute. Thereafter, the trial courts in the instant case correctly identified the issue and correctly decided the case. In both situations the courts uniformily acknowledge the exemption of disability pay from retired pay.

Additionally, we would again like to point out that Mr. Russell retired in 1972 and if the Court did happen to find that the disability retirement pay was community property then the decision would not apply to this case because it was a pre McCarty supra decision.

Congress use of the decision date of McCarty, supra evidenced legislative intent that the law relative to community property treatment of military retirement pension be as though the McCarty decision did not exist; that such pension would be subject to division or community property before and after Surpeme Court decision. In re Marriage of Frederick, 190 Cal. Rptr. 588 (Cal. App. 1983).

Petitioner would like the Court to believe that because the respondent retired after 19 years, 11 months and 5 days, he did so with the intent of avoiding payment to his wife of any portion of his pension. The court should note that petitioner is not an attorney and therefore surely did not understand the distintion between disability pay and full retirement pay in the content in which we are speaking. Further, the retirement from the military occured several years prior to the divorce. Therefore, any argument along these lines are nothing more than a smokescreen.

Twice this case has gone to the Third Circuit Court of Appeal, State of Louisiana. Twice the Third Circuit affirmed in part and reversed in part the judgment of the Trial Court. The judgment concerning the issue of whether Louisiana is precluded from treating military disability retirement benefits as community property was affirmed. However,

part of the case was reversed and remanded on the issue of whether there could be an accurate accessment of whether respondent's retirement benefits were in whole disability or part disability and part non-disability. The trial court determined that Mr. Russell's testimony and exhibits offered in evidence showed conclusively that all of his retirement pay, i.e. 30% of his base pay, is a result of a permanant disability. Therefore, the court concluded that these payments are not susceptible of division in accordance to the community property laws of the state. In so holding, the trial court obeyed the wishes of the Third Circuit Court of Appeal, State of Louisiana. It allowed the respondent the opportunity to offer evidence and show to the extent he could what part if any of the retirement benefits which he is now receiving is, in fact, disability pay. Based on that, the Trial Court made a decision. Because the case was remanded, the Third Circuit was not telling the Trial Court to automatically hold in favor of Mrs. Russell. However,it was telling the Trial Court to allow the

parties to introduce whatever evidence they would so desire, and based upon that, make a decision of whether these payments are 100% disability or a partial non-disability pension. Because the petitioner was unhappy with the Trial Court's reasoning, he appealed to Louisiana Supreme Court and, because the Louisiana Supreme Court denied his writs, he felt that they had decided a Federal question in a way in which conflicts with the decisions of other courts. Respondent maintains nothing could be further from the truth. The Supreme Court for the State of Louisiana has not decided an important question of Federal law which needs to be settled by this Court just because the Supreme Court of the State of Louisiana merely refused writs on a case that had gone up and down the appellate ladder. Accordingly, the respondent maintains that there exists no federal issue and, therefore, the judgments of the lower courts should be affirmed and judgment rendered on respondent's behalf, recognizing that his retirement pension is, indeed, a disability pension and,therefore, falls squarely in

the exclusion eneumerated in 10 U.S.C. 1408.

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CONCLUSION

Respondent, Gerald L. Russell, respectfully submits that the petition for writ of certiorari filed by Lillian Slay Russell should be denied. Alternatively, Respondent submits that summary affirmation of the decision below is appropriate.

Respectfully submitted,
LAW OFFICES OF EUGENE P. CICARDO

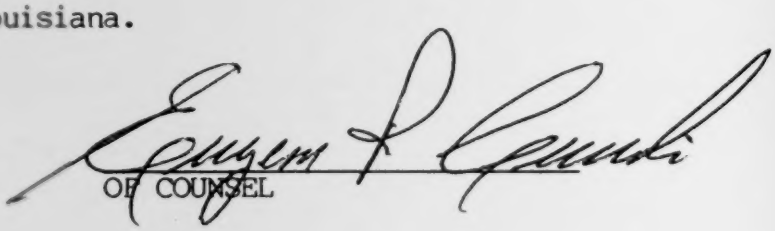
BY: _____

EUGENE P. CICARDO
P O DRAWER 1591
ALEXANDRIA, LA 71309

ATTORNEY FOR RESPONDENT

CERTIFICATE

I hereby certify that three (3) copies of the above and foregoing Respondant's Brief in Opposition for the Petition for Writ of Certiorari has been sent to Roy A. Halcomb, Jr., attorney at law, P.O. Box 1311, Alexandria, Louisiana 71309-1311 by placing same in the United States Mail, postage prepaid, properly addressed, this 2nd day of September, 1988 at Alexandria, Louisiana.



OF COUNSEL

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned authority, personally came and appeared EUGENE P. CICARDO, who did depose and state that he is counsel of record for GERALD L. RUSSELL in the above and foregoing proceedings and the affiant did on the 2nd day of September, 1988, deposit with Federal Express, with postage prepaid and properly addressed to the Clerk of the United States Supreme Court, the foregoing brief in opposition of the Petition for Writ of Certiorari and that the aforesaid date was within the time allowed for filing by the United States Supreme Court.

Eugene P. Cicardo

EUGENE P. CICARDO

SWORN TO AND SUBSCRIBED before me, notary public, on this 2nd day of September, 1988.

Gwen R. Deville

NOTARY PUBLIC

APPENDIX: LISTING OF PARENT, SUBSIDIARY
AND AFFILIATE COMPANIES: NOT APPLICABLE